Premier Model (M) Sdn Bhd v Phileo Promenade Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2-24-431 OF 1999
KAMALANATHAN RATNAM J
30 SEPTEMBER 1999

Civil Procedure *— Affidavits — Striking out of affidavit — Withdrawal of application — Whether applicant can impose terms and conditions without respondent's consent*

Civil Procedure *— Originating summons — Disposal of — Continuation of originating summons by way of writ action — No need for oral evidence — Delay if case go for trial — Whether application for leave to continue originating summons by way of writ action should be granted — Rules of the High Court 1980 O 28 r 8(1)*

The plaintiff entered into 16 similar sale and purchase agreements ('the SPAs') with the first defendant whereby the plaintiff purchased 16 office lots in a building owned by the first defendant. The plaintiff by way of an originating summons ('the OS') had applied for a declaration, inter alia, that all water and electricity meters in respect of the plaintiff's office lots belonged to the government and that no person including the defendants should be entitled to stop or interfere with the water and electricity supply. The defendants had made two application by way of encls 38 and 41. In respect of encl 38, the defendants applied to strike out one of the affidavits affirmed by the plaintiff's representative. Later, the defendants applied to withdraw encl 38 with no order as to costs and without prejudice to the defendants' right to object to the admissibility of the evidence, which was the subject of encl 38. Plaintiff's counsel objected to the conditions laid out. In respect of encl 41, the defendants applied for leave to continue the OS by way of a writ action pursuant to O 28 r 8(1) of the Rules of the High Court 1980 ('the RHC'). The defendants argued that they should be allowed to counterclaim from the plaintiff in respect of the plaintiff's alleged debt which the defendants allege arose out of the plaintiff's refusal to pay the quit rent, assessment, service charges, water supply charges, the sinking fund and other charges which amounted to RM149,091.42.

Held:

(1) Once there is a withdrawal of an application, unless the respondent agrees to the terms or conditions stipulated for the withdrawal, there can be no arbitrary terms or conditions that the applicant ought to stipulate (see p 368G–H).

(2) This case warrants disposal by process of an OS. The issue that is left to be decided relates to the alleged contravention of the Water Supply Enactment 1997 through disruption of water supply. The first defendant's manager had affirmed an affidavit on behalf of both defendants in which he has admitted that the water supply to the 16 units had been disrupted before the OS was filed. What

remains to be decided is whether the court would accept or reject the explanation, if any, as contained in the affidavits. There is no need for oral evidence. Justice will be delayed by embarking upon an exercise in futility by letting this case go for trial. As for the counterclaim, the defendants have themselves to blame for not moving after issuing their 16 notices of demand dated 19 November 1998. If the defendants had filed a suit, the plaintiff could have counterclaimed for the remedies sought by this OS. The court does not assist the indolent but would continue to dispense speedy justice to the vigilant (see pp 369G–370C).

[Bahasa Malaysia summary

Plaintiff telah memasuki 16 perjanjian-perjanjian jual beli yang serupa ('perjanjian-perjanjian tersebut') dengan defendan pertama di mana plaintif telah membeli 16 lot-lot pejabat yang dimiliki oleh defendan pertama. Plaintif melalui saman pemula ('SP') telah memohon untuk suatu deklarasi, antara lain, bahawa semua meter-meter air dan elektrik berhubung dengan lot-lot pejabat plaintif adalah dimiliki oleh kerajaan dan bahawa tiada seorang pun termasuklah defendan-defendan berhak untuk menghentikan atau mengganggu bekalan air dan elektrik. Defendan-defendan telah membuat dua permohonan melalui lampiran-lampiran 38 dan 41. Berhubung dengan lampiran 38, defendan-defendan telah memohon untuk membatalkan salah satu daripada afidavit-afidavit yang disahkan oleh wakil plaintif. Setelah itu, defendan-defendan telah memohon untuk menarik balik lampiran 38 tanpa sebarang perintah mengenai kos dan tanpa prejudis kepada hak defendan-defendan untuk membantah kebolehterimaan keterangan, yang tertakluk kepada lampiran 38. Peguam plaintif membantah terhadap syarat-syarat yang dinyatakan. Berhubung dengan lampiran 41, defendan-defendan telah memohon kebenaran untuk meneruskan SP tersebut melalui tindakan writ menurut A 28 k (1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan-defendan menghujahkan bahawa mereka sepatutnya dibenarkan untuk membuat tuntutan balas daripada plaintif berhubung dengan dakwaan hutang plaintif yang telah didakwa oleh defendan-defendan yang timbul daripada keengganan plaintif untuk membayar cukai tanah, taksiran, caj perkhidmatan, caj bekalan air, tabung kecemasan dan caj-caj lain berjumlah RM149,091.42.

Diputuskan:

(1) Apabila terdapat penarikan balik suatu permohonan, kecuali sekiranya responden bersetuju terhadap terma-terma atau syarat-syarat penarikbalikan tersebut, tidak boleh ada terma-terma atau syarat-syarat yang melampau yang mana pemohon sepatutnya menetapkan (lihat ms 368G–H).

(2) Kes ini mewajarkan penyelesaian melalui proses SP. Persoalan yang masih perlu diputuskan adalah berkaitan dengan dakwaan pelanggaran Enakmen Bekalan Air 1997 melalui gangguan

bekalan air. Pengurus defendan pertama telah mengesahkan satu afidavit bagi pihak kedua-dua defendan di mana beliau telah mengakui bahawa bekalan air kepada 16 unit telah mengalami gangguan sebelum SP difailkan. Apa yang masih perlu diputuskan adalah sama ada mahkamah akan menerima atau menolak penjelasan tersebut, jika ada, sebagaimana yang terkandung di dalam afidavit-afidavit tersebut. Keterangan lisan tidak diperlukan. Keadilan akan tertangguh sekiranya diteruskan perkara yang sia-sia dengan membenarkan kes ini dihadapkan untuk perbicaraan. Berhubung dengan tuntutan balas tersebut, defendan-defendan sendiri patut dipersalahkan kerana tidak membuat sesuatu setelah mengeluarkan 16 notis-notis tuntutan mereka bertarikh 19 November 1998. Jika defendan-defendan telah memfailkan tindakan guaman, plaintif mungkin boleh membuat tuntutan balas untuk remedi-remedi yang dipohon di dalam SP ini. Mahkamah tidak membantu seseorang yang indolen tetapi akan meneruskan penyelesaian yang adil dengan pantas kepada seseorang yang sentiasa berjaga-jaga (lihat ms 369G–370C).]

Notes

For cases on striking out of affidavit, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 290–292.

For cases on originating summons generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3176–3215.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd [1995] 3 MLJ 417

Legislation referred to

Rules of the High Court 1980 O 28 r 8(1)
Electricity Supply Act 1990 s 37(12)(a)
Water Supply Enactment 1997 s 43

M Menon (*Jaffar & Menon*) for the plaintiff.

Wong Kian Kheong (*Anis Fatimah Ibrahim* with him) (*Lee Hishammuddin*) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff entered into 16 similar sale and purchase agreements ('the SPAs') with the first defendant whereby the plaintiff purchased 16 office lots in a building owned by the first defendant. The said 16 SPAs contain, inter alia, similar relevant clauses which are as follows:

A Section 1.01(m):

> 'Service charges' which may be imposed by the defendants for the services provided by the defendants for the management, upkeep and maintenance of the building including the plaintiff's 16 office lots and 'service charges' include costs of electric power and water supply.

B Section 5.01(a):

> Provides that the plaintiff shall upon the defendants' demand pay to the defendants the quit rent and assessment on the plaintiff's 16 office lots.

Section 5.01(b)(1):

C

> Provides that the plaintiff shall be liable to pay the defendants for the service charges for the maintenance and management of 'the common property' as defined in clause 1.01(1).

Section 5.01(b)(2):

D

> Provides that the plaintiff shall pay service charges and a contribution to 'the sinking fund' at the rates specified in section 6(a) and (b) of Schedule A to the SPAs.

Sections 4.05 and 10.13:

> Provide that time shall be of the essence in relation to all provisions in the

E SPAs.

Section 5.07(ii) and (iii):

> Provide that the plaintiff shall pay to the defendants all water and electricity charges.

F Section 5.01(b)(3) and 10.01:

> Provide that the defendants may impose interest on any late payments of any sum due to the defendants under the SPAs.

Section 5.01(b)(4):

G

> Provided that the defendants are entitled to 'withdraw' or suspend any services, utilities, amenities or facilities in the event of plaintiff's default in payment of any sum due to the defendants under the SPAs.

The first defendant appointed the second defendant to manage the said building and to collect all payments due to the first defendant under the

H SPAs.

The plaintiff's claim by way of originating summons (OS)

The plaintiff's applications were basically for:

(a) a declaration that all the water and electricity meters in respect of the

I plaintiff's office lots belonged to the government and that no person including the defendants should be entitled to stop or interfere with the water and electricity supply;

(b) an injunction to restrain the defendants from disconnecting the water and electricity supply to the plaintiff's office lots;

(c) declarations that the plaintiff is not bound by section 5.01(b)(4) of the SPAs and that the defendants' action in stopping the water and electricity supply to the plaintiff's 16 office lots was unlawful;

(d) a declaration that the service charges imposed by the defendants are too high and had exceeded the actual maintenance costs;

(e) a declaration that the defendants are trustees in respect of the service charges paid by the plaintiff and that the defendants are obliged to provide details of accounts in respect of the use of the service charges and a financial report every six months;

(f) a declaration that the threats and/or action of the defendants to stop the lift services are contrary to the subsidiary legislation of the local authorities.

Application to convert the OS to writ action (encl 41)

Although the notice of appeal states that the defendants are appealing against my decision given on 13 July 1999, I had in fact given two decisions on 13 July 1999 in respect of two enclosures, namely encl 38 and encl 41.

Enclosure 38

This was an application by the defendants to strike out one of the affidavits affirmed by the plaintiff's representative. On the morning of 13 July 1999 Mr KK Wong for the defendants applied to withdraw encl 38 with no order as to costs and without prejudice to the defendants' right to object to the admissibility of the evidence, which was the subject of encl 38. Mr Menon for the plaintiff objected to the conditions laid out. He contended that if an application was to be withdrawn that was the end of the matter.

Since I do not know which enclosure the defendants are appealing against I am compelled in the interest of justice to write my judgment in respect of both applications. I think it is the paramount duty of counsel to indicate in his notice of appeal the particular enclosure he is appealing against to save the court much judicial time.

I am of the view that once there is a withdrawal of an application, unless the respondent agrees to the terms or conditions stipulated for the withdrawal, there can be no arbitrary terms or conditions that the applicant ought to stipulate, so long as he is unwilling to proceed with his application.

I had in fact struck out this application with no order as to costs. Since counsel for the defendant has put the court in this situation of having to write a judgment in respect of two enclosures, without stating which he is appealing against and since the order in respect of this application has not even been filed in draft form, I am inclined to vacate my order in respect of costs and to order that the defendants do pay the costs of the dismissal of encl 38 to be agreed or taxed.

Enclosure 41

This is the defendants' application for leave to continue the OS by way of a writ action pursuant to O 28 r 8(1) of the Rules of the High Court 1980 ('the RHC'). The said order reads as follows:

> Where in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

I dismissed the application on 13 July 1999 and now give my reasons.

The Court of Appeal in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 MLJ 417 unequivocally emphasized the discretionary power vested in this Court whether 'to permit the conversion of proceedings commenced by originating summons into a writ action'.

The defendants argue that they should be allowed to counterclaim from the plaintiff in respect of the plaintiff's alleged debt which the defendants allege arose out of the plaintiff's refusal to pay the quit rent, assessment, service charges, water supply charges, the sinking fund and other charges since 2 March 1998 and which sum has amounted to, as at 20 April 1999 to RM149,091.42. The plaintiff has however denied this claim.

In his oral submission before me, Mr KK Wong conceded that there were actually two issues raised by the plaintiff for resolution, namely: (1) whether the defendants have contravened s 43 of the Water Supply Enactment 1997; and (2) whether there has been a breach of s 37(12) para (a) of the Electricity Supply Act 1990.

In reply, Mr Menon pointed out that the defendants had in fact by their 16 letters of demand, all dated 19 November 1998 demanded from the plaintiff the alleged sums due, and yet had done nothing since then.

Findings of the court

At the outset, Mr Menon conceded that his client will not be relying on the breach of the Electricity Supply Act 1990 and that the plaintiff accepted the defendants' averment in the affidavit that the defendants had not, and never intended to cut the electricity supply. What remains therefore is only the issue relating to the alleged contravention of the Water Supply Enactment 1997.

The said s 43 of the Water Supply Enactment 1997 reads as follows:

> Any person who tampers with any valve, hydrant or any water supply system or part thereof shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

By encl 13 the first defendant's manager had affirmed an affidavit on behalf of both defendants in which he has admitted the fact that the water supply

to the 16 units had been disrupted before the OS was filed. To my mind with this admission what remains to be decided is whether the court would accept or reject the explanation, if any, as contained in the affidavits. There is absolutely no need for oral evidence. It is my judgment that justice will be delayed by embarking upon an exercise in futility by letting this case go for trial. In fact this is precisely the type of case that warrants disposal by process of an OS.

As for the question of the counterclaim, the defendants have themselves to blame for not moving after issuing their 16 notices of demand dated 19 November 1998. If the defendants had filed a suit, the plaintiff could have counterclaimed for the remedies sought by this OS. This is a classic case of the court not being willing to assist the indolent but that it would continue to dispense speedy justice to the vigilant.

In fact, since the defendants had admitted they had disrupted the water supply to the said 16 office lots, the only issue to be decided is whether there has been a breach pursuant to the said s 43 of the said Act. The decision of this court on this issue, speedily to be concluded by way of this OS, can have a telling and conclusive effect upon the defendants' counterclaim, if the defendants are still minded to pursue with their claim.

In the circumstances, it is clear that this attempt to delay the trial by a writ action is an attempt to derail the said trial.

Order accordingly.

Reported by Benjamin Yong